

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHELE COFFEY,

Plaintiff,

v.

ORDER
12-CV-138-A

PATRICK R. DONAHOE,
Postmaster General,

Defendant.

This action was referred to Magistrate Judge H. Kenneth Schroeder, Jr., pursuant to 28 U.S.C. § 636(b)(1)(B). On February 22, 2013, Magistrate Judge Schroeder filed a Report and Recommendation which recommends defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) be granted because plaintiff's complaint is untimely, and that plaintiff's motion to amend the complaint pursuant to Fed. R. Civ. P. 15(a)(2) be denied as futile.

Plaintiff filed objections to the Report and Recommendation on March 8, 2013. Defendant filed a memorandum of law in response to defendant's objections on March 25, 2013. Plaintiff filed a reply in support of her objections on April 1, 2013.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review of the Report and

Recommendation, the Court adopts the proposed findings of the Report and Recommendation.

The Court carefully considered plaintiff's objections, and specifically considered whether it should, pursuant to Fed. R. Civ. P. 42(b), conduct a separate trial of the date the November 10, 2011 right-to-sue letter was delivered to her. However, plaintiff concedes she has no evidence of the date the right-to-sue letter was delivered to her. The legal presumptions that the letter was delivered to plaintiff — even if the Court were inclined to allow an extra day to the presumptive three-day mailing period because of the intervening Veterans Day holiday on November 11, 2011 — results in the action being barred as untimely because the action was filed 96 days after the letter is presumed to have been mailed on November 10, 2011. Plaintiff's counsel's assertion that "there may be methods to track the mailing [and] delivery of these documents" lacks plausible evidentiary support and is not likely to have evidentiary support after even further investigation or discovery. Plaintiff therefore has an insufficient factual basis to amend her complaint to allege that the right-to-sue letter was actually delivered to her within 90 days of commencement of the action on February 14, 2012.

Accordingly, and for the reasons set forth in Magistrate Judge Schroeder's Report and Recommendation, defendant's motion pursuant to Fed. R. Civ. P. 12(b)(6) seeking dismissal of plaintiff's complaint as untimely filed is granted, and plaintiff's motion to amend the complaint pursuant to Fed. R. Civ. P. 15(a)(2) is denied.

The Clerk of Court shall take all steps necessary to close the case.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: June 26, 2013